

Robin A. McHugh  
Special Assistant Attorney General  
Montana Public Service Commission  
Legal Division  
1701 Prospect Avenue  
P.O. Box 202601  
Helena, MT 59620-2601  
Telephone: (406) 444-6376  
Attorney for Defendant Montana Public Service Commission

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY

\* \* \* \* \*

PUBLIC SERVICE COMMISSIONER	)	CAUSE NO. CDV-2006-372
BRAD MOLNAR ON BEHALF OF	)	
RESIDENTS OF PUBLIC SERVICE	)	
COMMISSION DISTRICT 2 AND	)	
ALL OTHERS SERVED BY	)	
NORTHWESTERN ENERGY.	)	
	)	
Plaintiff	)	BRIEF IN SUPPORT OF
	)	MOTION TO DISMISS
	)	COMPLAINT
v.	)	
	)	
THE MONTANA PUBLIC SERVICE	)	
COMMISSION [and] PENNSYLVANIA	)	
POWER AND LIGHT OF MONTANA	)	
LLC.	)	
	)	
Defendants.	)	

INTRODUCTION

The Montana Public Service Commission submits this brief in support of its Motion to Dismiss Complaint, filed this day in this cause.

BACKGROUND

On May 24, 2006 incumbent Public Service Commissioner Brad Molnar, appearing pro se, "on behalf of Residents of Public Service Commission District 2 and all others Served by NorthWestern Energy[,]" filed a Complaint in this Court naming the Montana Public Service Commission (PSC) and "Pennsylvania Power and Light of Montana LLC" as defendants. In the Complaint Commissioner Molnar alleges that an action the PSC took

on May 25, 1999 in PSC Docket No. D99.4.82 - memorialized and explained on the same date in a document titled "Notice of Commission Action Consenting to 'EWG' Status" (1999 NCA, attached) - violated certain state and federal laws, and should be "set aside[.]" Commissioner Molnar asks this Court to order the PSC "to start appropriate proceedings" to, in effect, reprocess the Montana Power Company/PP&L Montana, LLC filing in Docket No. D99.4.82 that led to the 1999 NCA. Complaint allegation No. 1 and Complaint prayer No. 1. Because the Complaint is untimely (and Commissioner Molnar lacks standing), the Complaint should be dismissed.

THE COMPLAINT IS AN UNLAWFUL ATTEMPT TO  
INSTITUTE JUDICIAL REVIEW OF AGENCY ACTION

The 1999 NCA was a PSC action subject to judicial review. Timely judicial review of that action could probably have been brought pursuant to either § 69-3-402, MCA, or § 2-4-702, MCA. Section 69-3-402, MCA, requires that an action challenging a PSC order commence "within 30 days" - presumably from the date the order is issued. Section 2-4-702, MCA, requires that a "petition" for judicial review be filed in district court "within 30 days after the written decision is rendered." In this case the Complaint was filed almost exactly seven years after the service date of the 1999 NCA.

Commissioner Molnar specifies no statutory basis for his Complaint, nor does he explain or attempt to explain how this Court can entertain judicial review of agency action - the 1999 NCA - years after the statutory deadline. The PSC has reviewed Montana law on judicial review of agency action and submits there is no basis on which this Court can consider this Complaint.

THIS COURT LACKS JURISDICTION  
OVER THE 1999 NCA AND THIS COMPLAINT

This Court has no jurisdiction over agency actions when judicial review is not timely filed. The Montana Supreme Court has made this point unambiguously: "An appeal filed after the time prescribed by statute is ineffective for any purpose and thus fails to confer jurisdiction upon the district court to review an administrative agency's decision." MCI Telecommunications v. Montana Department of Public Service Regulation, (1993) 260 Mont. 175, 177, 858 P.2d 364, 366. See also McGurran v. Department of Public

Health and Human Services, 1999 MT 192, ¶¶16-20, 295 Mont. 357, ¶¶16-20, 983 P.2d 968, ¶¶16-20.

PARENTHTICALLY, COMMISSIONER MOLNAR  
LACKS STANDING TO COMPLAIN OR SEEK  
JUDICIAL REVIEW OF THE 1999 NCA

In McTaggart v. PSC and MPC (1975), 168 Mont. 155, 541 P.2d 778, the Supreme Court dismissed in forceful terms a lawsuit brought by PSC Commissioner McTaggart against a PSC order from which McTaggart had dissented. Among other things the Court stated that “[c]haos would result if any dissenting member of a state board or agency had standing to appeal from any board or agency decision.” Id., 168 Mont. At 158, 541 P.2d at 780. This case is distinguishable from McTaggart in that Commissioner Molnar was not a member of the PSC when the 1999 NCA was decided. Despite that distinction, there is still reason to conclude that “chaos would result” if Commissioner Molnar (and similarly situated officials) were granted standing.

The PSC has made hundreds of decisions over many decades. Individual Commissioners change fairly frequently, within the context of the PSC as an institution that has continuity through time. Incumbent Commissioners have a right to decide current cases; and incumbent Commissioners have a right to disagree with past Commission decisions and to attempt to affect and change the course of PSC policy through their decisions on current cases. This is part of the organic nature of agency (and judicial) decision making that is vital to a coherent and organized government and society. However, it would indeed be chaos if agency decision makers were given the right to not only make current decisions and policy, but, through the judicial process, exhume and participate in past decisions as well. There is a societal reliance on organic decision making which would be seriously undermined if decision makers were given standing to sue the decision making bodies on which they sit over past decisions. As a sitting Commissioner, Commissioner Molnar has a right to attempt to persuade the PSC that it should do what it lawfully can to change a prior agency decision, including a decision made prior to his incumbency. But failing to so persuade, he should not have standing to sue.

CONCLUSION

The Complaint at issue here constitutes judicial review of agency action. This Court lacks jurisdiction over actions for judicial review that are not timely filed.

Therefore, this Complaint should be dismissed.

DATED this 12th day of June, 2006.

Respectfully submitted,

\_\_\_\_\_  
Robin A. McHugh  
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT has been served by mail, postage prepaid, upon the following this 12th day of June, 2006

Brad Molnar  
1701 Prospect Avenue  
Helena MT 59620  
&  
Box 517  
Laurel, MT 59044-0517

Joseph P Mazurek  
100 N. Park Ave.  
Helena, MT 59601

David Kinnard  
PPL Montana  
303 North Broadway, Suite 400  
Billings, MT 59101-1255

---

Connie Jones, Commission Secretary